

BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS
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FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION
121 Seventh Place East, Suite 350
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LeRoy Koppendrayner
R. Marshall Johnson
Gregory Scott
Phyllis Reha

Chair
Commissioner
Commissioner
Commissioner

In the Matter of the Complaint of
Eschelon Telecom of Minnesota, Inc.
Against Qwest Corporation.

OAH Docket No. 15-2500-15426-2
MPUC Docket No. P-421/C-03-627

**DEPARTMENT OF COMMERCE RESPONSE TO QWEST
CORPORATION'S MOTION FOR SUMMARY JUDGMENT
REGARDING ESCHELON'S OPT-IN CLAIM AND RESPONSE TO
ESCHELON'S INITIAL BRIEF**

I. INTRODUCTION

On April 23, 2003, Eschelon Telecom of Minnesota, Inc. (Eschelon) filed a formal Complaint claiming that Eschelon is entitled to the same rate from Qwest for a service known as UNE-Star⁹ as that paid by one of its competitors, McLeodUSA (McLeod); that Eschelon is entitled to receive nondiscriminatory rates from Qwest.

Qwest maintains that it never refused to amend Eschelon's pricing, but that in order for Eschelon to obtain McLeod's pricing, Eschelon must agree to the same terms and conditions as McLeod, including the volume commitments and the termination date.

Qwest asserts that what Eschelon proposes is not an "opt-in" but rather a negotiation and that Eschelon does not have a right to opt-in to McLeod's pricing without addressing the other differences between the Eschelon and McLeod Interconnection Agreement (ICA), while Eschelon argues that it is

⁹ The service at issue is known as UNE-E when applied to Eschelon, UNE-M when applied to McLeod or generically as UNE-Star. UNE-Star is the general term also used by the Department to refer to both UNE-M and UNE-E.

entitled to the same price for UNE-Star as McLeod and it need not make other changes to its Agreement to obtain that rate, because any differences in the two agreements are not legitimately related to the rate.

Qwest expressed a willingness to negotiate an amendment to address Eschelon's pricing request and provided a Qwest contact for engaging in such negotiations, but Eschelon has been unwilling to negotiate to obtain the McLeodUSA pricing, maintaining that it was entitled to the pricing despite the other terms of the agreement.¹⁰ Qwest maintains that it never refused to amend Eschelon's pricing, but has made it clear that it is unwilling to give Eschelon McLeod's pricing unless Eschelon agree to make other changes to its UNE-Star agreement.¹¹

Qwest challenges the jurisdiction of the Commission to address any of the issues raised by Eschelon in this Complaint and further asserts that the Commission is without any authority to award damages to Eschelon in this case

As discussed in further detail below, the Department recommends that the ALJ find that:

1. The Commission has jurisdiction to resolve Eschelon's Complaint.
2. Qwest was required to provide Eschelon with the reduced pricing on the UNE-Star product, and that Eschelon was not required to negotiate an amendment to its ICA
3. Eschelon is entitled to the reduced rate for the remainder of the term of the McLeod Amendment or for so long as McLeod benefits from that rate, whichever is longer
4. The Commission has authority to issue an order to correct Qwest's discriminatory treatment of Eschelon, including retroactive monetary relief.

II. STATEMENT OF FACTS

The material facts are not in dispute:¹²

¹⁰ Eschelon Complaint, Ex. B-6, at 7; Eschelon Complaint, Ex. B-5, at 5.

¹¹ See Ex 3 to Eschelon's Initial Brief (November 8, 2002 letter to Eschelon from Qwest stating that to obtain McLeod's UNE-Star rate Eschelon must agree to the same terms and conditions as McLeod, including the volume commitments and the termination date).

¹² Qwest has filed a Motion for Summary Judgment and asked for treatment pursuant to OAH Rule 1400.5500(K), which provides that the Office of Administrative Hearings is empowered to "recommend a summary disposition in a case or any part thereof where there is no dispute as to any issue of fact . . ." Eschelon in its Initial Brief also argues that it is entitled to relief based on the undisputed facts in the record. Because the facts material to this issue are for the most part not in dispute, summary disposition would be appropriate.

1 Eschelon and Qwest entered into an Interconnection Agreement (Agreement or Interconnection Agreement or ICA) that was approved by the Commission on October 4, 1999. (Docket No. P-5340, 421/M-99-1223) See Exhibit A to Complaint That Agreement was premised on the original arbitrated AT&T/US WEST Agreement.

2. On October 1, 2000, Qwest and McLeodUSA entered into the Eighth Amendment to their Interconnection Agreement. Exhibit A-2 to Complaint. That Amendment was not filed with the Commission, and thus not made public until December 20, 2000. It was approved by the Commission in Docket P5323,421/IC-00-1707, on January 26, 2001. That Amendment provided for UNE-M or UNE-Star at the recurring rates listed in Attachment 3.2 to that Amendment The Platform recurring rate for Minnesota was \$27 00

3 On November 15, 2000, Qwest and Eschelon entered into the Eighth Amendment to their Interconnection Agreement (UNE-Star Amendment) Exhibit A-3 to Complaint The Amendment was approved by the Commission on January 26, 2001 in Docket No P5340,421/IC-00-1657 This Amendment provided for the purchase of UNE-Star at the rates provided in Attachment 3.2 of that Amendment. The Platform Recurring rate for Minnesota was \$27.00.

4 The rates were the same as the rates in the McLeodUSA UNE-Star Amendment even though the termination dates and the volumes differed greatly between the two agreements Pursuant to the terms of the McLeod USA Amendment, McLeodUSA pricing expires on December 31, 2003.¹³ Eschelon requests that it receive pricing until December 31, 2005, the expiration date of its agreement with Qwest.¹⁴

5 On or about September of 2002, McLeodUSA and Qwest entered into an Amendment of their Interconnection Agreement. This document amended the pricing of UNE-Star for McLeodUSA.¹⁵ The Amendment provided for a reduction of UNE-Star rates in Minnesota from \$27.00 per month to \$24.50 per month for McLeod. That Amendment was approved by Commission Order dated February 7, 2003, in Docket No. P-5323,421/IC-02-1566.

6 Immediately after learning of this amendment, Eschelon asked Qwest to give it the same UNE-Star rates as those made available to McLeodUSA In making its request, Eschelon requested the

¹³ See Complaint, Ex A-5 at 2

¹⁴ See Complaint, Ex A-3, at 1

price contained in the agreement without any corresponding provisions.¹⁶ Qwest has repeatedly refused to do so unless Eschelon agrees to the other terms and conditions of the Qwest/McLeodUSA Amendment¹⁷

7 Qwest expressed a willingness to negotiate an amendment to address Eschelon's pricing request and provided a Qwest contact for engaging in such negotiations.¹⁸ Eschelon was unwilling to negotiate to obtain the McLeodUSA pricing, absent an agreement by Qwest to waive other terms of the agreement, including the expiration of the pricing agreement and the volume commitments contained in the agreement¹⁹

III. ARGUMENT

A. Jurisdiction

Qwest maintains that the Minnesota Public Utilities Commission lacks jurisdiction to hear this dispute--that "Eschelon has not sought to opt-into the McLeod agreement without modifying its terms" and thus neither the Act nor the FCC's rules provide the Minnesota Commission with jurisdiction.²⁰ The Department agrees with Eschelon that this claim necessarily fails. The very issue for the Commission to decide is what additional terms, if any, are legitimately related to the rate paid by McLeod. The FCC has made it clear that it is the state commissions that should examine the issue in the first instance. *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) (First Report and Order), ¶1321. There, the FCC stated in relevant part:

Since agreements shall necessarily be filed with the states pursuant to section 252(h), we leave to state commissions in the first instance the details of the procedures for making agreements available to requesting carriers on an expedited basis.²¹

Moreover, the Commission has express authority to enforce the ICA, which includes whether Qwest has violated Eschelon's right to its so-called "most favored nation" provision. Under Eschelon's Interconnection Agreement, Qwest must provide network elements to Eschelon on rates, terms and

¹⁵ See Complaint, Ex. A-5

¹⁶ See Eschelon Complaint, Ex. B-5, at 5

¹⁷ See Corbetta Letter, Ex. 3 to Eschelon's Initial Brief; Engels Letter, Ex. B-6 to Complaint.

¹⁸ See Eschelon Complaint, Ex. B-6 at 7

¹⁹ See Eschelon Complaint, ¶ 9

²⁰ See Qwest Answer at 11.

²¹ *Id.* at ¶ 1321

conditions no less favorable than those provided to itself or any other party.²² The Commission clearly has jurisdiction to address an alleged breach of an ICA.²³

In either event, the Commission has explicit jurisdiction over the issues presented in these proceedings

B. Eschelon is Entitled to the Same Reduction in Price as McLeod Received for UNE-Star.

Eschelon is entitled to the same price reduction for UNE-Star as that provided to McLeodUSA. Pursuant to Section 251 of the Act, interconnection and unbundled element rates provided by an ILEC must be nondiscriminatory. The Act provides methods for CLECs to take advantage of their right to nondiscriminatory rates. One avenue is to allow CLECs to "pick and choose" provisions from the interconnection agreements of other CLECs as provided in Section 252(i) of the Act. The FCC made it clear that the Act's nondiscrimination provisions apply to an ILEC's attempts to restrict availability of provisions under section 252(i). First Report and Order, ¶ 1315.

Section 252(i) of the Act states:

"a local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under [section 252] to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."²⁴

The FCC promulgated a rule to implement 252 (i)--47 CFR § 51.809 (1997).²⁵ In its Order implementing its rule, the FCC has stated that section 252(i) is "a primary tool of the 1996 Act for preventing discrimination under section 251."²⁶ Rule 51.809 provides, in relevant part:

"An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection,

²² See Part A, Part III, Sec. 37, pp. 28-29 of the Eschelon Interconnection Agreement, attached as Ex. 2 to Eschelon's Initial Brief.

²³ See *In the Matter of Core Communications, Inc. v. Verizon Maryland, Inc.*, 2003 WL 1917249, FCC 03-96, rel., April 23, 2003 ¶ 29 and note 85 (the great weight of court and Commission authorities hold that state commissions have authority to enforce interconnection agreements) (citations omitted.); *Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 946 (8th Cir. 2000) (holding that the Telecommunications Act provides that an interconnection agreement must be submitted to the state commission for approval. This grant of power to state commissions necessarily includes the power to enforce the interconnection agreement).

²⁴ 47 USC 252(i).

²⁵ The rule is attached to Eschelon's Initial Brief as Ex. 5.

²⁶ See First Report & Order at ¶ 1296

service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement."

The rule further provides that the ILEC (Qwest) is required to allow the CLEC (Eschelon) to pick and choose unless and until "the incumbent proves to the state commission" that either the costs of providing the service to the requesting carrier (Eschelon) are greater than the costs of providing it to the original carrier (McLeod), or it is not technically feasible to provide the service to the requesting carrier.²⁷ The burden is clearly on Qwest to prove that "pick and choose" is not required here because of cost or technical infeasibility.²⁸

The FCC concluded that Section 252(i) itself acts as a most favored nation clause, whether or not included in the parties' interconnection agreement,²⁹ as a method to ensure nondiscriminatory rates. The FCC stated

We further conclude that section 252(i) entitles all parties with interconnection agreements to "most favored nation" status regardless of whether they include "most favored nation" clauses in their agreements. Congress's command under section 252(i) was that parties may utilize any individual interconnection, service, or element in publicly filed interconnection agreements and incorporate it into the terms of their interconnection agreement. This means that any requesting carrier may avail itself of more advantageous terms and conditions subsequently negotiated by any other carrier for the same individual interconnection, service, or element once the subsequent agreement is filed with, and approved by, the state commission. We believe the approach we adopt will maximize competition by ensuring that carriers' obtain access to terms and elements on a nondiscriminatory basis.³⁰

While Qwest has suggested that the costs of providing UNE-Star differ between Eschelon and McLeod because of differing terms such as volume, Qwest has simply failed to meet its burden of proof that its cost to provide the UNE to Eschelon is significantly greater than its cost to provide it to McLeod.

The fact that Eschelon and McLeod entered into UNE-Star agreements within 45 days of each other in 2000 is undisputed. The agreements were virtually identical with the exception of two major items—term and volume—the initial term of the McLeod agreement expired on December 31, 2003, whereas the

²⁷ 47 CFR § 51.809(b)

²⁸ Technical infeasibility has not been raised by Qwest as it is already providing UNE-Star to Eschelon.

²⁹ Under Eschelon's ICA, Qwest must provide network elements to Eschelon on rates, terms and conditions no less favorable than those provided to itself or any other party. See Part A, Part III, Sec. 37, pp. 28-29 of the Eschelon Interconnection Agreement, attached as Ex. 2 to Eschelon's Initial Brief.

initial term of the Eschelon Agreement expired on December 31, 2005, McLeod committed to purchase at least 275,000 local exchange lines per year, but Eschelon only committed to purchase at least 50,000 access lines per year. Both agreements contain Attachment 3.2, which set out identical rates for the two companies despite the differences of term and volume.

In September of 2002, McLeod and Qwest entered into a new amendment of their UNE-Star Agreement, reducing the pricing of UNE-Star to McLeod by about 9%, without changing any other terms. The McLeod UNE-Star agreement termination date and volume commitments did not change, nor did any other term in the McLeod agreement.

On this record, Qwest has failed to establish that the cost of providing the service would increase as a result of providing this discount to Eschelon. As such, Eschelon is entitled to the price reduction.

C. Eschelon Should Be Allowed To Adopt Price Reduction For Same Term As McLeod

The Department agrees with Qwest, however, that Eschelon should be bound by the term of the price reduction. It is undisputed that the specified term of the McLeod ICA--and pricing discount--is *shorter* than Eschelon's contract term.³¹ Again, section 252(i) of the Act provides that:

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those *provided* in the agreement (emphasis added).

The FCC provided some, but not complete guidance in its Rules:

Individual interconnection, service, or network element arrangements shall remain available for use by telecommunications carriers pursuant to this section *for a reasonable period of time* after the approved agreement is available for public inspection under § 252(f) of the Act (emphasis added).³²

While the Commission has never formally ruled on the exact issue presented in this case, it recently touched on this issue albeit in the context of the adoptability of an agreement that had gone past its

³⁰ See First Report & Order at ¶ 1316.

³¹ An interesting issue is raised if the terms of the basic ICA terminate/expire before these amendments. For example, counsel for Eschelon stated in an earlier proceeding dealing with rates, "The other thing that all parties to this negotiation knew was that our agreement was set to expire soon, our underlying agreement. and in fact it has expired now and is in Evergreen status. And that meant even though we negotiated those rates and were entitled to those rates, we knew and Qwest knew that they could change once the agreement expired." See transcript of proceedings, *In the Matter of the Complaint of Eschelon Telecom of Minnesota, Inc., Against Qwest Corporation*, MPUC Docket No. P-421/C-02-550 (August 29, 2002) at 8. Similarly in this case, both Qwest and McLeod would have known that the UNESat amendment, if not the entire underlying ICA, would soon expire.

expiration date, but where the network elements were still being provided under the agreement--the so-called "evergreen" status³³ There, after seeking comment from the industry, the Commission adopted a Policy Statement which provided

(i) The upper limit of the adoption window is the termination date stated in an ICA for those ICAs where the ILEC is no longer providing interconnection, elements, or services to any CLEC or CMRS provider under the terms of the ICA in question

(ii) The adoption window remains open for an ICA after the termination date stated therein to the extent that the ILEC continues to provide interconnection, elements, or services to any CLEC or CMRS provider under the ICA in question. Any adopting CLEC or CMRS provider would be subject to the same termination provisions as negotiated by the original negotiating carrier.

(iii) Notwithstanding (i) and (ii), the availability of an ICA for adoption shall be bounded by a showing by the ILEC that, pursuant to § 51 809(b), (a) it is not technically feasible to provide service to the requesting carrier, or (b) the costs of providing service to the requesting carrier are higher than the costs of providing service to the original negotiating carrier

(iv) To the extent that there is a debate as to interpretation of "provided" in § 252(i) the parties may approach the Commission for resolution.³⁴

The Commission fully recognized that its policy did not have the force and effect of law and only provided a starting point for deliberations³⁵ However, the Department sees no compelling basis in this record to deviate from that policy.

Therefore, Eschelon should receive the benefit of the reduced pricing from the time of their initial request until at least until December 31, 2003, (the expiration date of McLeod Amendment), at which time Eschelon would revert to the original pricing for the remaining two years (to December 31, 2005) of Eschelon's amendment). To the extent that this amendment will survive expiration of the underlying ICA or will itself go into an "evergreen" type status or where McLeod continues to reap the benefit of these lower UNE rates, Eschelon should continue to benefit as well.

D. Other ICA Differences Cited By Qwest.

Qwest has identified four other ways in which the two contracts differ: (1) Termination dates; (2) CCMS (Custom Call Management System), (3) A \$0.35 monthly recurring rate for AIN features;

³² See FCC Rule § 51.809(c); *see also*, First Report and Order at ¶ 1319.

³³ See *In the Matter of the Inquiry Regarding the Adoptability of interconnection Agreements Pursuant to Section 252(i) of the Telecommunications Act of 1996*, MPUC Docket No. P-999/CI-02-116 (May 16, 2002) (attached as Ex. 1)

³⁴ *Id.* at 2.

(4) Eschelon has non-recurring charges for UNE-Star, added as part of the above-referenced CCMS amendment, which McLeod does not.³⁶

Without repeating all of Eschelon's arguments here, the Department agrees with Eschelon that none of those differences are legitimately related to the rate for UNE-Star; they are additional terms applicable to Eschelon, rather than related terms of the McLeod agreement that Eschelon seeks to avoid.³⁷ As Eschelon points out, it is seeking to opt-in to the McLeod rates for UNE-Star, not the other way around. Therefore, the relevant question is not what terms Eschelon has in its agreement, but rather what terms McLeod has in its agreement. Qwest should not be allowed to use the additional, unrelated terms in the Eschelon agreement to prevent Eschelon from opting in to the McLeod UNE-Star pricing.

Because Qwest has failed to establish that any of these four differences are legitimately related to the price that McLeod pays for UNE-Star, the ALJ should recommend that the Commission require Qwest to provide Eschelon with the McLeod UNE-Star pricing.

E. The Commission Has The Authority To Correct The Harm Caused By Qwest's Conduct.

The Commission has the authority to award damages for Qwest's refusal to allow adoption of the lower UNE rates both by state statute and because of express authority granted by the ICA herein.

1. The Commission has authority to issue an order to correct the discrimination caused by Qwest's refusal to allow adoption of the reduced UNE rates.

As a creature of statute, the Commission enjoys only the authority granted to it by the legislature. See *Frost-Benco Elec Ass'n v Public Utils Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984); *Great Northern Ry v Public Serv Comm'n*, 284 Minn. 217, 220-21, 169 N.W.2d 732, 735 (1969). That authority may be either express or implied. "While express statutory authority need not be given a cramped reading, any enlargement of express powers by implication must be fairly drawn and fairly evident from the agency objectives and powers expressly given by the legislature." *Peoples Natural Gas Co v Public Utils Comm'n*, 369 N.W.2d 530, 534-36 (Minn. 1985). In *Peoples Natural Gas*, the Minnesota Supreme court held that the Commission lacked express or implied authority to enforce its own orders by ordering a

³⁵ See *Id.* at 1

³⁶ See Response to Esch 016, attached to Eschelon's Initial Brief as Ex. 6.

³⁷ See Eschelon Initial Brief at 7-10

customer refund, noting that other enforcement tools were available in the statutes. The Court based its conclusion on Minn Stat § 216.27, the controlling statute at that time for gas company rates, which specifically provided only for prospective relief

Minn Stat. § 237.081, subd 4 provides that if the Commission finds that “any rate, toll, tariff, charge, or schedule, or any regulation, measurement, practice, act, or omission affecting or relating to the production, transmission, delivery, or furnishing of telephone service or any service in connection with telephone service, is in any respect unreasonable, insufficient, or unjustly discriminatory,” the Commission “shall make an order respecting the tariff, regulation, act, omission, practice, or service that is just and reasonable and, if applicable, shall establish just and reasonable rates and prices.”

This statute not only authorizes the Commission to award prospective relief “if applicable,” the statute clearly allows the Commission to “make an order respecting the * * * practice, or service that is just and reasonable * * *.” This language does not state or imply that the Commission’s authority to award damages or other remunerative relief for a past episode is limited. Had the legislature intended to limit the Commission as suggested by Qwest, it could and would have said so in more explicit terms. The legislature obviously recognized the need to give the Commission broad authority to address the broad type of harm that could be caused by improper company practices.³⁸

In an unpublished decision of the Minnesota Court of Appeals, *In the Matter of the Formal Complaint of the Members of the MIPA Against US West Communications, Inc.*, No. CO-97-606 (Dec. 30, 1997) (unpublished opinion) (copy attached pursuant to Minn. Stat. § 480A.08(3) as Ex 2), the Court reviewed Minn. Stat. §§ 237.081 and .461, as well as the decision in *Peoples Natural Gas*, and held that the Commission had authority to establish just and reasonable rates and order appropriate action, including retroactive refunds. *See Id* at 3

In the present case, because Eschelon established that Qwest improperly provided McLeod more favorable and discriminatory pricing than Eschelon, the Commission has the authority to order a retroactive refund

³⁸ See also *In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements*, Order After Reconsideration on Own Motion, Docket No. P-421/C-02-197 (April 30, 2003) (Holding that the Commission has statutory authority to order monetary payments to correct discriminatory conduct).

2. The ICA provides the Commission with authority to award monetary damages.

Even if the Commission somehow lacks state statutory authority to award damages in this case, the Commission has express authority to enforce the ICA, which includes whether Qwest has violated Eschelon's right to its so-called "most favored nation" provision. The underlying ICA specifies that damages and equitable relief are remedies available under the ICA,³⁹ and the fact that the parties specifically agreed in the ICA that the Commission has jurisdiction and the authority to enforce the ICA⁴⁰ The assertion further disregards FCC and federal court decisions in which the state commissions have been held to have continuing authority to enforce ICAs.⁴¹

Specifically, Section 11.1 of the ICA constitutes an agreement by the parties that the Commission has jurisdiction to enforce the ICA and states, in part, "The Parties . agree that the Commission has continuing jurisdiction to implement and enforce all term and conditions of this Agreement..." The ICA further specifies that damages and equitable relief are remedies available under the ICA⁴² The parties specifically agreed in the ICA that the Commission has jurisdiction and the authority to enforce the ICA.⁴³

³⁹ See ICA § 10.4 (attached as Ex. 3 at 3) The ICA, at sections 8.4, 10.1, 10.2 and 10.4 preserve all remedies available to the parties at law and equity, including injunctive relief, specific performance, equitable remedies, and remedies available at law or by administrative process (copies of these sections are attached as Ex. 2).

⁴⁰ See § 11.1 (The ICA specifies that "[t]he Parties recognize and agree that the Commission has continuing jurisdiction to implement and enforce all terms and conditions of this Agreement. Accordingly, the Parties agree that any dispute arising out of or relating to this Agreement...may be submitted to the Commission for resolution")

⁴¹ See *MCI Telecommunications Corp v Bellsouth Telecommunications, Inc*, 298 F.3d 1269, 1274, (11th Cir. 2003) (holding that enforcement of ICA provisions, including compensation provisions and liquidated damages provision clearly contemplated by the Telecommunications Act and within the authority of state commissions), *Southwestern Bell Tel Co v. Connect Communications Corp.*, 225 F.3d 942, 946 (8th Cir. 2000) (The Telecommunications Act provides that an interconnection agreement must be submitted to the state commission for approval. This grant of power to state commissions necessarily includes the power to enforce the interconnection agreement); *In the Matter of Core Communications, Inc v Verizon Maryland, Inc*, 2003 WL 1917249, FCC 03-96, rel.: April 23, 2003 ¶ 29 and note 85 (the great weight of court and Commission authorities hold that state commissions have authority to enforce interconnection agreements) (citations omitted.)

⁴² See ICA § 10.4 (Ex. 3 at 3). The ICA, at sections 8.4, 10.1, 10.2 and 10.4 preserve all remedies available to the parties at law and equity, including injunctive relief, specific performance, equitable remedies, and remedies available at law or by administrative process.

⁴³ See § 11.1 (Ex. 3 at 3-4). (The ICA specifies that "[t]he Parties recognize and agree that the Commission has continuing jurisdiction to implement and enforce all terms and conditions of this Agreement. Accordingly, the Parties agree that any dispute arising out of or relating to this Agreement...may be submitted to the Commission for resolution")

Again, the FCC and federal courts have held that the state commissions have continuing authority to enforce ICAs.⁴⁴ Qwest has failed to establish that the Commission lacks authority to enforce the other provisions of the ICA that set forth the remedies for breach to which the parties agreed.

Such an outcome is consistent with established legal precedent holding that state commissions may enforce ICA provisions, including provisions on compensation and damages.⁴⁵

IV. CONCLUSION

Based upon the forgoing, the ALJ should recommend that the Commission find that Eschelon was entitled to the same rate as McLeod for UNE-Star and the Commission should order Qwest to change that rate for Eschelon. The lower prices should be deemed effective as of the date that Eschelon first requested to adopt that rate, and for the remainder of the term of the McLeod Amendment or for so long as McLeod continues to benefit from that rate, whichever is longer. The ALJ should further recommend that the Commission order retroactive monetary relief to Eschelon to correct Qwest's improper and discriminatory conduct.

Dated: _____

Respectfully submitted,

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⁴⁴ *Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 946 (8th Cir. 2000) (The Telecommunications Act provides that an interconnection agreement must be submitted to the state commission for approval. This grant of power to state commissions necessarily includes the power to enforce the interconnection agreement); *In the Matter of Core Communications, Inc. v. Verizon Maryland, Inc.*, 2003 WL 1917249, FCC 03-96, rel. April 23, 2003 ¶ 29 and note 85 (the great weight of court and Commission authorities hold that state commissions have authority to enforce interconnection agreements) (citations omitted.)

⁴⁵ See, e.g., *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, 298 F.3d 1269, 1274, (11th Cir. 2003) (enforcement of ICA provisions, including compensation provisions and liquidated damages provision clearly contemplated by the Telecommunications Act and within the authority of state commissions)

DEPARTMENT OF COMMERCE

AG #896700-v1

**STATE OF MINNESOTA
BEFORE THE PUBLIC UTILITIES COMMISSION**

**LeRoy Koppendrayer
R. Marshall Johnson
Gregory Scott
Phyllis Reha
Ellen Gavin**

**Chair
Commissioner
Commissioner
Commissioner
Commissioner**

In the matter of the Complaint of Eschelon)
Telecom of Minnesota, Inc. against Qwest)
Corporation, formerly known as U S West)
Communications, Inc.)
)
)
)

Docket No P _____

**COMPLAINT AGAINST QWEST
CORPORATION, AND REQUEST
FOR EXPEDITED PROCEEDING
PURSUANT TO MINN. STAT. 237.462**

Eschelon Telecom of Minnesota, Inc ("Eschelon") hereby brings this Complaint, consisting of two separate issues, against Qwest Corporation ("Qwest") and alleges as follows:

INTRODUCTION AND PARTIES

1 Eschelon files this Complaint with the Minnesota Public Utilities Commission ("MPUC" or "Commission") in order to obtain immediate relief from the refusal of Qwest to honor its contractual, statutory, and other obligations to provide interconnection at non-discriminatory rates as required under the Telecommunications Act of 1996 (the Act) and state law.

2 Specifically, Qwest charges Eschelon higher rates for UNE-Star than it charges to McLeodUSA. Qwest's refusal to make UNE-Star available to Eschelon at the same rate it is provided to McLeod is contrary to the Act, the parties' Interconnection Agreement (ICA) and Chapter 237 of the Minnesota Statutes. Furthermore, Eschelon is entitled to a refund of payments made for private lines that should have been available to Eschelon as combinations of unbundled network elements known as EELs. Qwest's failure to reprice those circuits violates the Act, Chapter 237 of the Minnesota Statutes and the parties' Interconnection Agreement.

3. Due to the continuous nature of Qwest's violations of law related to these practices, Eschelon requests that the Commission order an expedited hearing pursuant to Minn. Stat. § 237.462, Subd. 6. Eschelon requests such relief as may be just and reasonable and in accordance with applicable Minnesota and federal law, including, without limitation, the initiation of a complaint and investigation by

the Commission pursuant to Minn Stat § 237.081, Subd. 1(a), the issuance of an administrative penalty order by the Commission pursuant to Minn Stat § 237.462, Subds 1 and 2, the issuance of an Order requiring Qwest to provide UNE-Star to Eschelon at non-discriminatory rates and ordering repricing of special access at EEL rates, and such other relief as the Commission deems appropriate.⁴⁶

4 Eschelon is a competitive local exchange carrier ("CLEC") providing local and interexchange telecommunications services in Qwest's service territory in Minnesota, primarily serving small business customers. As a CLEC in competition with Qwest and other CLECs, Eschelon must establish and retain its reputation as a viable alternative to the incumbent telephone company. In order to compete, Eschelon must avail itself of rights provided under law to gain competitive access to the market.

5 Eschelon's principal place of business is 730 Second Avenue South, Suite 1200, Minneapolis, Minnesota 55402. Eschelon is certified to provide local exchange service in Minnesota pursuant to orders of the MPUC dated July 18, 1996 and April 12, 1999.

6. Eschelon is represented in this proceeding by its attorney:

Dennis D Ahlers
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7 Respondent Qwest is a Colorado corporation, with offices in Minnesota at 200 South Fifth Street, Minneapolis, Minnesota 55402. Qwest is an incumbent local exchange carrier ("ILEC") within the meaning of Section 251(h) of the Telecommunications Act of 1996 (the "Act"), and provides local exchange, exchange access and inter-exchange services in Minnesota subject to the Commission's regulatory authority. Qwest is the dominant monopoly provider of local exchange service in Minnesota.

8 Eschelon has served Qwest with this Complaint through.

⁴⁶ Eschelon also reserves its rights to such private remedies as may be available pursuant to Minnesota law and recognized in Minn. Stat. § 237.462, Subd. 11.

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JURISDICTION

The MPUC has jurisdiction over this Complaint pursuant to 47 U.S.C. § 251(c)(1)(D) and (3) (authority of state commissions to enforce requirement that Qwest provide facilities and equipment "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. ."), 47 U.S.C. §252(e) (authority of state commissions to enforce interconnection agreements), 47 U.S.C. 252(I) and 47 C.F.R. 51.809 (1997), Minn. Stat. §§ 237.081, Subd. 1(a) (investigations), 237.462, and Subds. 1 and 6 (competitive enforcement)

FACTUAL BACKGROUND

A. ESCHELON IS ENTITLED TO THE SAME RATES AS MCLEOD FOR UNE-STAR.

1 On or about October 4, 1999, the Commission approved an Agreement For Local Wireline Network Interconnection and Service Resale (the "Interconnection Agreement" or "Agreement") between Qwest and Exchelon. Relevant excerpts from a true and correct copy of the Interconnection Agreement are attached as Exhibit A-1 ⁴⁷

2. The Parties' Interconnection Agreement provides that if the Parties cannot resolve a dispute they may apply to the Commission for resolution. *Id*, Part A, Section 11. The Agreement further provides that the Parties will seek expedited resolution by the Commission of any such dispute and shall request that resolution occur in no event later than 60 days from the date of submission of the dispute to the Commission *Id*

3 On October 1, 2000, Qwest and McLeodUSA entered into the Eighth Amendment to their Interconnection Agreement. Exhibit A-2 That Amendment was filed with the Commission on December 20, 2000 in Docket P5323,421/IC-00-1707, and approved on January 26, 2001. That Amendment provided for UNE-M or UNE-Star⁴⁸ at the rates listed in the Addendum to that Amendment.

4 On November 15, 2000, Qwest and Eschelon entered into the Eighth Amendment to their Interconnection Agreement (UNE-Star Amendment). Exhibit A-3 The Amendment was approved by the Commission on January 26, 2001 in Docket No P5340,421/IC-00-1657 This Amendment provided for the purchase of UNE-Star at the rates provided in Attachment 3.2 of that Amendment. The rates were the same as the rates in the McLeodUSA UNE-Star Amendment even though the termination dates and the volume commitments differed greatly

5. On July 31, 2001, Eschelon and Qwest entered into the Twelfth Amendment to their Interconnection Agreement, which allowed Eschelon to purchase switch-based Advanced Intelligent Network (AIN) features, at retail rates, as well as other switch-based features and listing charges to be included in the UNE-Star (referred to in the Amendment as UNE-P) flat rate. Exhibit A-4. Adding additional features into the flat-rated UNE-Star charge of the right to purchase such AIN features as a part of UNE-Star, resulted in a 35-cent increase in the recurring rates for Eschelon. See Amended Attachment 3.2 in Exhibit A-4.

6 On or about September of 2002, McLeodUSA and Qwest entered into an Amendment of their Interconnection Agreement, which amended the pricing of UNE-Star for McLeodUSA. A true and correct copy of the Amendment is attached hereto as Exhibit A-5 The Amendment provided for a reduction of UNE-Star rates in Minnesota from \$27.00 per month to \$24.50 per month for McLeod That Amendment was approved by Commission Order dated February 7, 2003, in Docket No P-5323,421/IC-02-1566

7 Immediately thereafter, Eschelon asked Qwest to give it the same UNE-Star rates as those made available to McLeodUSA Qwest has repeatedly refused to do so unless Eschelon agrees to all other terms and conditions of the Qwest/McLeodUSA Amendment. Engels Letter, Exhibit B-5.

⁴⁷ All Exhibits are exhibits to the Affidavit of William D. Markert appended as Attachment 1 to this Complaint.

⁴⁸ At various times and in various documents, the services at issue are referred to as UNE-E and UNE-M, or UNE-Star. Throughout this document, the term UNE-Star will be used to refer to all three.

8. Eschelon's Interconnection Agreement provides that Qwest must provide network elements to Eschelon on rates, terms, and conditions no less favorable than those provided to itself or any other party Exhibit A-1, Part A, Part III, Sec 37, pp. 28-29.

9 The prices for UNE-Star contained in the McLeodUSA Agreement and Eschelon agreements were exactly the same, despite these other terms and conditions that Qwest now claims are tied to the prices in the amended agreement The only difference in the rates that is justified is that the equivalent prices for Eschelon should be 35 cents higher than the McLeodUSA rates due to the AIN Amendment. Therefore, Eschelon's UNE-Star rate recurring rate should be \$24.85, compared with the rate of \$24.50 for McLeod and instead of the \$27.35 currently being charged to Eschelon

10. Section 252(i) of the Act provides that Qwest must provide network elements to Eschelon at the same rates, terms and conditions as it provides it to McLeodUSA. As the FCC stated in the First Report and Order, CC Docket No. 96-98, released August 8, 1996, ¶ 1314 ("First Report"): "In practical terms, this means that a carrier may obtain access to individual elements such as unbundled loops at the same rates, terms, and conditions as contained in any approved agreement."

Furthermore, the FCC stated:

[W]here an incumbent LEC proposes to treat one carrier differently than another, the incumbent LEC must prove to the state commission that that differential treatment is justified based on the cost to the LEC of providing that element to the carrier.

First Report, ¶ 1317

11. The rates for UNE-Star are not volume based. If they were the rates originally charged to McLeodUSA and Eschelon for that product would not have been identical. The rates are not tied to the termination date. The termination dates of the McLeodUSA and Eschelon agreements were different in the original agreements, yet the rates were the same. The termination date of the McLeodUSA agreement did not change in the Amendment. The only difference in the services provided is an agreement between Eschelon and Qwest that gives Eschelon the opportunity to order additional features at a flat-rated charge. Eschelon concedes that its rate should be 35 cents higher to reflect that difference.

12 At no time has Qwest requested Commission authority to price UNEs differently based on volumes The Commission has conducted two exhaustive cost dockets to establish UNE prices, and Qwest did not, at any time during those proceedings, present evidence that volumes purchased should impact price The Commission never established prices that varied by volume for UNEs including Star.

made available to McLeodUSA must be available to Eschelon.

14. Section 252 of the Act requires that Qwest make UNE-Star available to Eschelon at nondiscriminatory rates. Qwest refuses to do so. As a consequence, Qwest has overcharged Eschelon approximately \$4,145 per month for UNE-Star since September of 2002, and is continuing to do so on an ongoing basis. The Commission should require Qwest to charge Eschelon the McLeodUSA UNE-Star rates and order Qwest to refund the amounts overcharged.

B. ESCHELON IS ENTITLED TO EEL RATES FROM THE TIME OF INSTALLATION OF ITS SPECIAL ACCESS CIRCUITS.

1. An Enhanced Extended Loop or EEL is a combination of a Loop and dedicated interoffice transport; network elements that Eschelon is entitled to purchase and to combine under its Interconnection Agreement. Exhibit 1-A, Part A, Part III: Unbundled Network Elements.

2. On November 5, 1999 the FCC ruled that EELs must be made available to CLECs at unbundled network element prices. *Third Report and Order*, 15 FCC Rcd at 3909 Paras 480-81 (citing 47 C.F.R. 51.315(b)). The FCC required that ILECs, upon request, must convert or re-price special access circuits into an EEL.

3. In late 1999 and early 2000, Eschelon wanted to purchase this combination of elements to conduct its business in Minnesota. However, Qwest did not provide a process for Eschelon to order EELs or convert its special access circuits to EELs until October, 2001. Prior to that date Qwest instructed Eschelon to order EELs as special access circuits and required Eschelon to pay tariffed retail rates, as opposed to UNE rates, for this combination of network elements.

4. From March 2000 through October 2001, Eschelon purchased 113 special access circuits from Qwest's Minnesota and FCC Private Line Tariff for use as EEL equivalents.

5. Eschelon initially ordered EELs as special access circuits using an Access Service Request (ASR). When Eschelon objected to paying the retail, as opposed to wholesale, rate for this resold service, Qwest responded that Eschelon was supposed to have ordered these circuits on a Local Service Request (LSR), and that by ordering it using an ASR Eschelon had ordered it as an access service for which no wholesale discount was required. When Eschelon pointed out that no matter what form was used to order it the service was being used to provide EELs, Qwest insisted that it was the form used to order the service that dictated the substance and the price.

6 This position was contradicted by Qwest on March 8, 2001, when Qwest issued a notice stating that the ordering process for EELs had been changed. Qwest acknowledged that the "current ordering method for provisioning of EEL products is done via an Access Service Request (ASR). Qwest has modified systems to now accept conversion and provisioning of EEL's(sic) via the Local Service Request (LSR) " Exhibit B-1

7. Thus Qwest's own notice acknowledged that EELs were properly ordered on an ASR until March of 2001. Qwest's notice also confirmed that whether an order is processed by use of an ASR or LSR does not define the use or nature of the service. Neither the service, nor the rate changed when the ordering process was changed by Qwest.

8 Qwest claims that it made EELs available in March of 2000. That claim is not valid. While it is true that on March 30, 2000, Eschelon received a notice from Qwest about the availability of EELs (Exhibit B-2).⁴⁹ That notice specified that EEL "is only available for new requests (i e , no conversions of existing services) and is only available if an end user is served out of the following wire centers." (parenthetical added). It then listed wire centers where EELs were not, in fact, available ⁵⁰ Thus, Qwest's announcement specified that existing circuits could not be converted to EELs and that new requests for EELs were only available in certain limited locations. Furthermore, despite this announcement, Qwest continued to instruct Eschelon to order EELs as special access circuits and required Eschelon to pay tariffed as opposed to UNE rates for the combinations.

9. Furthermore, before Qwest would even consider providing EELs, it required that Eschelon enter into an amendment to the Interconnection Agreement even though the ICA provided for such combinations. Thus, Qwest would not honor Eschelon's request unless Eschelon agreed to an unnecessary and one-sided amendment to the Interconnection Agreement. Eschelon refused and demanded its right to EELs under the already existing Agreement and Qwest refused to provide EELs unless a new amendment was signed. Finally, in February 2001, Qwest issued a notice (Exhibit B-3, attached) that conceded that if an existing interconnection agreement contains the elements and rates necessary for the requested combination, no new amendment is necessary. The Qwest notice stated, in part: "...if a Co-

⁴⁹ Although the Notice states that the EEL product is available as of February 17, 2000, the Notice was not sent out until March 30, 2000.

⁵⁰ In fact, the Notice was erroneous, the wire centers listed were those in which EELs were not available, as opposed to those in which EELs were available.

Provider's Interconnection Agreement contains access to combinations in general, and the Agreement contains all Unbundled Network Elements and associated rates necessary to make the desired combination, an Amendment is not required " This notice once again contradicted Qwest's previous position

10. In October of 2001, Eschelon was finally able to order and convert EELs in locations desirable to Eschelon. However, Qwest has refused to reprice the previously ordered special access circuits as EELs and refund the difference between the UNE and tariffed rates.

11. Qwest settled exactly the same issue with MCI WorldCom Network Services (WorldCom) under a Confidential Billing Settlement Agreement dated June 29, 2001. Exhibit B-4. As is explained in that Agreement, WorldCom claimed that approximately 2,500 private line circuits provided by Qwest to WorldCom in various states should have been converted to the Unbundled Network Element Platform known as EEL from tariffed services during the time period between September 4, 1997 through the date of the agreement. WorldCom was required to convert its private lines to EELs as part of the agreement and the parties agreed to a payment made by Qwest for past services billed. Eschelon has since also converted its private line circuits in April 2002.

12. Beginning in November of 2001, Eschelon made the request repeatedly to Qwest for a refund of the amounts paid for these circuits but did not received an answer. On February 10, 2003, Eschelon made a request to Patricia A. Engels, Executive Vice President of Wholesale Markets for Qwest. Qwest denied the request. Qwest admitted that the WorldCom agreement includes "a payment and resolution of past disputes regarding the conversion of private line circuits to EELs" but asserted it is not an Interconnection Agreement and therefore is not available for opt-in. Engels Letter (Exhibit B-5) at p. 2.

13. Eschelon has the same basic Interconnection Agreement as WorldCom including the entitlement to combinations like EELs. Qwest agreed to provide WorldCom with a payment as to this issue. Eschelon's identical dispute with Qwest should also result in Qwest's payment of the difference between the price Eschelon paid for these lines and the price it should have paid had Qwest provided Eschelon with combinations (i.e., EELs), as required by the parties' Interconnection Agreements.

14. Eschelon is requesting a refund of \$532,225 for Minnesota, for the difference between Qwest's tariffed rates billed and paid by Eschelon and Eschelon's Interconnection Agreement rates for elements that make up an EEL. Eschelon has calculated that from March 2000 through April 30, 2002, Eschelon was billed and paid \$839,671.37 for these circuits. Had Eschelon been able to order EELs during this time, it would have only had to pay \$307,445.91, or \$532,225.46 less than it paid.

C. ESCHELON HAS ATTEMPTED TO RESOLVE THIS ISSUE BEFORE BRINGING THIS MATTER TO THE COMMISSION.

1 As stated Eschelon has contacted Qwest to ask for the rates in the McLeodUSA Amendment. Qwest has taken the position that Eschelon must take all of the terms and conditions of the McLeodUSA Amendment including volume commitments, termination date and other provisions that are unrelated to price. Exhibits B-5 and B-6, Engels Letters.

2. Eschelon has also requested a refund of the difference between the tariffed rate for special access and the EEL rate from March 1, 2000 to October, 2001. Qwest also rejected that request. Exhibits B-5 and B-6. Engels Letters

QWEST'S CONTINUING VIOLATIONS OF LAW

Qwest's refusal to provide Eschelon UNE-Star at the same rates that the service is provided to McLeodUSA and refusal to refund overcharges for EELs causes significant harm to Eschelon and its customers and injures the development of a competitive marketplace for telecommunication services in Minnesota.

Qwest benefits by charging and retaining higher rates than it is entitled to. Qwest also benefits to the extent that the marketing efforts of Eschelon are generally delayed or impeded due to unreasonable and uncertain prices for capacity for its network.

Qwest's actions with regard to Eschelon, as detailed above, constitute continuing breaches of the Interconnection Agreement approved by this Commission and continuing violations of state and federal law

As demonstrated above, Qwest has breached its Interconnection Agreement with Eschelon and state and federal law by, among other things:

(1) Failing to provide UNE-Star to Eschelon at the same, non-discriminatory rate that it provides the service to McLeodUSA.

(2) Failing to provide EELs to Eschelon at the Commission approved prices

Qwest's continuing breaches of the Interconnection Agreement violates Minn. Stat. § 237.121(a)(4) which prohibits Qwest from refusing to provide a service, product, or facility in accordance with its contracts and the MPUC's rules and orders.

Qwest's breaches of the Interconnection Agreement violate the Act, which requires Qwest to provide interconnection on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms of its Interconnection Agreement. 47 U.S.C. §§ 251(c)(2)(C), (D).

Qwest's breaches further violate the Act by constituting a barrier to Eschelon's entry into the local market in Minnesota, prohibited in 47 U.S.C. § 253.

Qwest's conduct, as described above, harms the public interest, because Eschelon's ability to compete is adversely affected, thereby denying end users the traditional benefits of competition.

Notwithstanding the conduct of Qwest described above, Eschelon has fully and in good faith performed all of its duties and obligations under the Interconnection Agreement, the Act and applicable state law.

REQUEST FOR EXPEDITED HEARING AND THE IMPOSITION OF ADMINISTRATIVE PENALTIES

A. AN EXPEDITED PROCEEDING IS NECESSARY.

The Interconnection Agreement between Qwest and Eschelon recognizes the Commission's continuing jurisdiction to implement and enforce all of the terms and conditions of the Agreement. Exhibit

A-1, Section 11.1 Further, the Agreement provides that any dispute arising out of or relating to the Agreement that the Parties themselves cannot resolve, may be submitted to the Commission for resolution *Id* The Agreement further provides that the Parties agree to seek expedited resolution by the Commission of any such dispute and shall request that resolution occur in no event later than 60 days from the date of submission of the dispute to the Commission. *Id*

The Interconnection Agreement provisions in this regard are consistent with Minn Stat. § 237.462, Subd. 6 That statute provides that the Commission may order an expedited proceeding if the Commission finds it to be in the public interest In making this determination, the Commission may consider “any evidence of impairment of the provision of telecommunication service subscribers in the state or impairment of the provision of any service or network element ”

Both under the terms of the Interconnection Agreement and Minnesota Statutes, the Commission should grant an expedited proceeding in this matter. The problems detailed in this Complaint have continued for some time without abatement, with significant harm to Eschelon and Eschelon’s customers. Moreover, delay in resolving disputes of this nature inure to the benefit of the incumbent provider, since each day it can impose pricing uncertainty on Eschelon increases the business risk to Eschelon.

RELIEF REQUESTED

WHEREFORE, Eschelon respectfully requests that the Commission:

1. Investigate the issues raised in this Complaint pursuant to Minn. Stat. § 237.081, Subd. 1;
2. Resolve this matter within 60 days in an expedited proceeding, pursuant to the terms of the Interconnection Agreement and Minn Stat § 237.462, Subd. 6;
3. Declare that the actions of Qwest detailed above constitute continual violations of its Interconnection Agreement with Eschelon,
4. Declare that the actions of Qwest detailed above constitute continual violations of Minn. Stat. §§ 237.06, 237.121(a)(2) and 237.121(a)(4);
5. Declare that the actions of Qwest detailed above constitute multiple and continual violations of the Act, including 47 U.S.C. 251(c)(2)(D) and (3), and 252 (i) and the relevant rules;
6. Order that Qwest make UNE-Star available to Eschelon at the same rates that it is available to McLeodUSA, back to the date of the date of the McLeodUSA Amendment.

- 7 Order Qwest to immediately refund to Eschelon the difference between the rate for special access circuits and EELs for all relevant periods.
8. Grant Eschelon any and all relief to which it is entitled under the Interconnection Agreement for Qwest's breaches of contract,
- 9 Assess administrative penalties against Qwest for its repeated violations of state and federal law and the Interconnection Agreement, as authorized by Minn. Stat. § 237.462, Subd. 1, and
- 10 Grant Eschelon such other and further relief as the Commission deems appropriate.

Dated: April _____, 2003

Respectfully submitted,

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ESCHELON TELECOM OF WASHINGTON, INC.,)	No. C03-1296R
ESCHELON TELECOM OF ARIZONA, INC.;)	
ESCHELON TELECOM OF COLORADO, INC.;)	COMPLAINT
ESCHELON TELECOM OF MINNESOTA, INC.;)	
ESCHELON TELECOM OF OREGON, INC.;)	
and)	
ESCHELON TELECOM OF UTAH, INC.,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
QWEST CORPORATION,)	
)	
Defendant.)	

JURISDICTION AND VENUE

1. This Court has jurisdiction under 28 U.S.C. § 1332. The matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs and is between citizens of different states. Eschelon Telecom of Washington, Inc., is incorporated in Minnesota and has its principal place of business in Minnesota. Eschelon Telecom of Arizona, Inc., is incorporated in Minnesota and has its principal place of business in Minnesota. Eschelon Telecom of Colorado, Inc., is incorporated in Minnesota and has its principal place of business in Minnesota. Eschelon Telecom of Minnesota, Inc., is incorporated in Minnesota and has its principal place of business in Minnesota. Eschelon Telecom of Oregon, Inc., is incorporated in Minnesota and has its principal place of business in Minnesota. Eschelon Telecom of Utah, Inc., is incorporated in Minnesota and has its principal place of business in Minnesota. Qwest Corporation ("Qwest") is incorporated in Delaware and has its principal place of business in Colorado.

2. This Court also has jurisdiction under 28 U.S.C. § 1331. The claims stated herein arise under the laws of the United States, specifically, the Telecommunications Act of 1996, codified in various sections commencing at 47 U.S.C. § 151, *et seq.*

3. The Western District of Washington at Seattle is the proper venue under 28 U.S.C. § 1391. A substantial part of the events or omissions giving rise to the claim occurred in King County, and Qwest is subject to personal jurisdiction in King County.

PARTIES

4. Plaintiffs (collectively, "Eschelon") are competitive local exchange carriers ("CLECs") that provide local exchange telephone service. Eschelon serves markets in Qwest's territory in Seattle-Tacoma, Washington; Phoenix, Arizona; Denver-Boulder, Colorado; Minneapolis-St. Paul, Minnesota; Portland-Salem-Eugene, Oregon; and Salt Lake City, Utah. Eschelon is the successor to American Telephone

Technology, Inc., Electro-Tel, Inc., Cady Telemanagement, Inc., and Advanced Telecommunications, Inc. Eschelon provides local exchange telephone service to customers in two primary ways: through Eschelon's telephone network, and through a telephone network owned by an incumbent local exchange carrier (e.g., Qwest), to which Eschelon has or its predecessors had access pursuant to interconnection agreements as required by 47 U.S.C. §§ 251-252. Eschelon has satisfied all prerequisites necessary to bring this action.

5. Qwest is an incumbent local exchange carrier ("ILEC") that, in pertinent part, provides services, equipment, facilities, and network elements to Eschelon and other CLECs pursuant to interconnection agreements, as required by 47 U.S.C. §§ 251-252. Qwest merged with, and is the successor to, U S West, Inc., the parent company of U S West Communications, Inc. ("U S West"). Qwest is liable for the contracts that U S West entered into with Eschelon or Eschelon's predecessors, as described below

FACTS

The Parties' Interconnection Agreements

6. In 1999 and 2000, Qwest's and Eschelon's predecessors arbitrated, negotiated or opted into interconnection agreements for every state in which they both do business, namely, Washington, Arizona, Colorado, Minnesota, Oregon, and Utah. These agreements established rates, terms, and conditions for the interconnection of Eschelon's and Qwest's telecommunications networks, as well as for the provision of certain services by Qwest to Eschelon.

7. For Washington, the interconnection agreement is the "Agreement for Local Wireline Network Interconnection and Service Resale" between U S West and American Telephone Technology, Inc. For Arizona, the agreement is the "Agreement for Local Wireline Network Interconnection and Service Resale" between U S West and American Telephone Technology, Inc. For Colorado, the agreement is the "Interconnection Agreement" between U S West and Electro-Tel, Inc. For Minnesota, the agreement is the "Agreement for Local Wireline Network Interconnection and Service Resale" between U S West and Cady Telemanagement, Inc. For Oregon, the agreement is the "Agreement for Local Wireline Network Interconnection and Service Resale" between U S West and American Telephone Technology, Inc. For Utah, the agreement is "Agreement for Local Wireline Network Interconnection and Service Resale" between U S West and Advanced Telecommunications, Inc. The foregoing contracts are collectively referred to herein as the "Interconnection Agreements."

8. On November 15, 2000, Qwest and Eschelon executed an "Interconnection Agreement Amendment Terms" ("Interconnection Agreement Amendment") that amended the terms of the Interconnection Agreements.

Carrier Access Billing System

9. Qwest and Eschelon own and operate digital loop carrier facilities and voice switching facilities in the geographic areas in which they do business. As the incumbent local exchange carrier, Qwest is required by federal law to permit Eschelon and other local exchange carriers to interconnect with Qwest's network. Pursuant to the Interconnection Agreements, as amended, Eschelon leases Qwest's distribution and transport network to link Eschelon's customers to Eschelon's switches in order to provide them with telecommunications services. In addition, Eschelon leases combinations of Qwest's distribution plant and Qwest's switching facilities to serve the portion of Eschelon's customers that are not served by Eschelon's switches.

10. Under federal law, local exchange carriers, such as Eschelon, are to be compensated for the cost of transporting and terminating telephone calls that are originated or terminated from or to their customers by customers of other telecommunications carriers. If a caller in New York calls an Eschelon customer in Washington, for example, Eschelon is entitled to collect an access charge from the caller's long distance carrier. Similarly, if an Eschelon customer in Washington calls someone in New York, Eschelon is also entitled to collect an access charge from its customer's long distance carrier.

11. Qwest is one of several long distance carriers from which Eschelon is entitled to collect access charges. Long distance carriers route calls to, and receive calls from, either designated Qwest end office switches (dedicated end office transport), or from access tandems in every geographic area in which Eschelon conducts business. In order to collect access charges, Eschelon must be able to provide long distance carriers with call records of long distance calls, formatted according to industry standards. These records are produced by Eschelon's switches in some instances, and by Qwest's access tandem or local switches or end office switches in others.

12. In the industry, the process by which long distance calls generate records – which are used to collect access charges from long distance carriers – is known as the Carrier Access Billing System (“CABS”). Eschelon’s switches generate CABS records for long distance calls *originated* by Eschelon’s customers who are served by Eschelon’s switches (on-net customers). However, Eschelon must rely on Qwest to provide CABS records of long distance calls *received* by customers who are served by Eschelon’s switches (on-net customers), as well as for all long distance calls *made or received* by Eschelon’s customers who are served by Qwest’s switches using unbundled network element combinations (off-net customers).

13. The underlying Interconnection Agreements for each state (*e.g.*, Section 7 of Attachment 7 of the Interconnection Agreement for Minnesota) and Section 3.3 of the Interconnection Agreement Amendment, require Qwest to provide complete and accurate CABS records for Eschelon’s on-net and off-net customers on a daily basis so that Eschelon can bill interexchange or other companies for access charges. Therefore, Qwest is obligated to provide Eschelon with complete and accurate CABS records so that Eschelon can collect the access charges it is entitled to from long distance carriers, including Qwest, for long distance calls pursuant to the Interconnection Agreements and federal law.

14. Qwest has provided Eschelon with some CABS records, but Eschelon has discovered that Qwest has not provided all of the CABS records for Eschelon’s on-net and off-net customers. In 2001 and 2002, Eschelon engaged third-party telecommunications consultants to audit the completeness and accuracy of the CABS records provided to Eschelon by Qwest. The audits included test calls to Eschelon customers and test calls from Eschelon customers. In addition, Qwest conducted an audit of its CABS records in cooperation with Eschelon. Based upon the most recent audit, Eschelon found that Qwest’s CABS records failed to capture approximately 16% of the total call records for which Eschelon would have been entitled to collect access charges. In addition, Eschelon found that Qwest has not provided complete and accurate CABS records for Qwest-carried long distance toll calls that terminated on Eschelon’s on-net lines, an omission that financially benefits Qwest to Eschelon’s detriment.

15. Qwest is liable for incidental and consequential damages under the Interconnection Agreements for breaches that are repeated or are found to be a pattern of conduct. Qwest has continually failed to provide Eschelon with complete and accurate CABS records, even after Eschelon raised the issue with Qwest. Qwest’s failure to provide Eschelon with complete and accurate CABS records deprives Eschelon of substantial compensation to which Eschelon is entitled. As a result, Eschelon has been unable to bill for and collect approximately \$77,500 per month in access charges, for a total of approximately \$1.2 million from March 2002 through May 2003. The Interconnection Agreements (*e.g.*, Section 4 of Part A of the Interconnection Agreement for Minnesota, and Sections 17-18 of Attachment 7) also require Qwest to pay for Eschelon’s audit costs. Eschelon has incurred approximately \$288,000 in auditing costs for the most recent CABS auditing projects. Qwest has refused to pay such costs.

Automated Conversion of Eschelon’s Resale Customer Base to UNE-E

16. Eschelon has been a wholesale customer of Qwest and its predecessors since 1996. Initially, Eschelon purchased some of Qwest’s services under the “Resale” provisions of the Interconnection Agreements. The Interconnection Agreements and federal law also allow Eschelon to provide telecommunications service to its customers through Qwest’s unbundled network elements (“UNEs”). UNEs are parts of an ILEC’s (*e.g.*, Qwest’s) network, such as the loop, switching, and transport functions. Pursuant to 47 U.S.C. § 251(c)(3), ILECs are required to offer UNEs for lease to CLECs. UNEs enable a CLEC to provide telecommunications service to customers who are not served directly by the CLEC’s switch and telephone lines.

17. In 2000, Eschelon had a contractual right to convert its base of 49,000 resale lines to a Qwest product known as unbundled network element platform (“UNE-P”), as well as to order UNE-P for new lines. However, Qwest was not prepared to provide Eschelon with the prices, services and quality that Eschelon was entitled to under the UNE-P platform. Instead, Qwest offered to provide the prices, services and quality that Eschelon wanted through a new product (later called UNE-Eschelon or “UNE-E”).

18. During the negotiations regarding UNE-E, Eschelon questioned how Qwest intended to convert Eschelon’s 49,000 resale lines to UNE-E without disruption in service or functionality. Qwest responded that it could perform an automated (as opposed to manual) conversion process, but Eschelon would have to pay for Qwest to do so. Eschelon agreed. Pursuant to Paragraph 2.1 of the Interconnection Agreement Amendment, Qwest promised to convert Eschelon’s base of resale customers to the UNE-E

platform and release Eschelon from any termination liability in exchange for Eschelon's payment to Qwest of \$10 million. Of the \$10 million, Eschelon paid \$4 million for Qwest to automatically convert Eschelon's resale customers to the UNE-E platform and avoid the service disruptions and errors that a manual conversion would cause.

19. In addition to Qwest's promise to prevent service disruptions during the conversion itself, Qwest promised that the conversion would result in accurate bills, so that the bills would no longer reflect the wholesale discount associated with resale service, and would instead show the UNE-E rates in the Interconnection Agreement Amendment. Thus, Qwest was obligated to provide Eschelon with an automated conversion to a working UNE-E product.

20. Despite Qwest's promises to the contrary, Qwest never converted (automatically or otherwise) Eschelon's resale base to an accurately billed UNE-E product. To date, Eschelon has not obtained any benefit from the \$4 million it paid Qwest.

Commercially Viable DSL Service

21. CLECs typically provide their customers with high-speed Internet access through digital subscriber lines ("DSL"). Under Section 2.2 of the Interconnection Agreement Amendment, Qwest agreed to make DSL service available to Eschelon's customers through the UNE-E platform, beginning November 15, 2000. After the amendment was signed, Eschelon discovered that Qwest did not have a process in place to provide commercially viable DSL service. As a result, Eschelon was not able to offer or provide its customers with Qwest DSL service until August 2001, despite Qwest's commitment to provide Eschelon with DSL service as of November 15, 2000.

22. Given that numerous Eschelon customers had ordered DSL service from Eschelon, and Qwest was unable to fulfill the orders, Eschelon was required to purchase DSL service from another supplier at substantially higher prices. As a result of Qwest's breach, Eschelon's costs to provide its customers with DSL service was approximately \$1.7 million higher than the costs Eschelon would have incurred otherwise.

FIRST CAUSE OF ACTION – BREACH OF CONTRACT (CABS)

23. Eschelon re-alleges the allegations contained above.

24. Qwest contracted with Eschelon and promised, for valuable consideration, to provide complete and accurate CABS records for long distance calls to and from Eschelon's customers for Eschelon's use in billing long distance carriers for access charges. Eschelon performed its obligations in all material respects. Qwest has engaged in a pattern of conduct that has repeatedly breached the contract by failing to provide Eschelon with the data necessary to bill for such calls. As a proximate result, Eschelon has suffered damages (including incidental damages, consequential damages, and audit costs) in an amount to be proven at trial (but no less than \$1.2 million, from March 2002 through May 2003, plus the \$288,000 in unpaid auditing costs that Eschelon incurred to confirm Qwest's breaches).

SECOND CAUSE OF ACTION – BREACH OF CONTRACT (UNE-E)

25. Eschelon re-alleges the allegations contained above.

26. Qwest contracted with Eschelon, and Eschelon paid Qwest consideration of \$4 million, to automatically convert Eschelon's base of 49,000 resale lines to the UNE-E platform without disruption in service or functionality. Eschelon performed its obligations under the contract in all material respects. Qwest has engaged in a pattern of conduct that repeatedly has breached the contract by failing to provide the automated process, failing to convert Eschelon's resale customer base to the UNE-E platform, and failing to accurately bill Eschelon for UNE-E services. As a proximate result, Eschelon has not obtained the benefit of its bargain and has suffered damages (including incidental and consequential damages) in an amount to be proven at trial (but no less than the \$4 million consideration Eschelon paid Qwest to perform the automatic conversion).

THIRD CAUSE OF ACTION – BREACH OF CONTRACT (DSL)

27. Eschelon re-alleges the allegations contained above.

31 Qwest contracted with Eschelon, for valuable consideration, to make DSL service available for Eschelon to sell to its customers. Eschelon performed its obligations in all material respects. Qwest engaged in a pattern of conduct that repeatedly breached the contract by failing to provide the promised service. As a proximate result, Eschelon has suffered damages (including incidental and consequential damages) in an amount to be proven at trial but no less than the \$1 7 million in additional costs that Eschelon has incurred to obtain DSL service from a third party).

PRAYER FOR RELIEF

WHEREFORE, Eschelon prays for the following relief:

1. For actual, incidental, special, and consequential damages (in an amount to be proven at trial, but for purposes of this pleading, no less than \$7,188,000),

2. For prejudgment interest,

3. For all other such relief as the Court deems proper

DATED this 16th day of June, 2003

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